$\frac{1}{2}$	COMMONWEALTH OF KENTUCKY BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY	
3	DEFORE THE TUBLIC SERVICE COMMISSION OF RENTUCKI	
4 5	In the Matter of:	
6	AN ELECTRONIC EXAMINATION OF THE APPLICATION OF THE FUEL ADJUSTMENT CLAUSE OF BIG RIVERS ELECTRIC CORPORATION FROM MAY 1, 2021 THROUGH OCTOBER 31, 2021) Case No. 2022-00041	
7 8 9 10	MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL TREATMENT	
11 12	1. Big Rivers Electric Corporation ("Big Rivers") hereby moves the	
13	Public Service Commission of Kentucky (the "Commission"), pursuant to 807	
14	KAR 5:001 Section 13, KRS 61.878 and KRS 278.160(3) to grant confidential	
15	treatment to certain information contained in Big Rivers' amended response to	
16	Item 5, and the attachment to its amended response to Item 21 of the information	
17	requested in the Appendix to the Commission's March 31, 2022, Order in this	
18	matter.	
19	2. The information for which Big Rivers seeks confidential treatment is	
20	hereinafter referred to as the "Confidential Information." The Confidential	
21	Information consists of information regarding confidential fuel supply bids to Big	
22	Rivers and its analysis of those bids.	
23	3. Pursuant to the Commission's Emergency Orders in <i>In the Matter of:</i>	
24	Electronic Emergency Docket Related to the Novel Coronavirus Covid-19, Case No.	
25	2020-00085, one (1) copy of the Confidential Information highlighted in yellow or	

- 1 otherwise marked "CONFIDENTIAL," is being filed with this motion via
- 2 electronic mail sent to <u>PSCED@ky.gov</u>. One (1) copy of the documents with the
- 3 Confidential Information redacted is also being electronically filed with this
- 4 request. 807 KAR 5:001 Section 13(2)(a)(3).
- 5 4. A copy of this motion with the Confidential Information redacted has
- 6 been served on all parties to this proceeding through the use of electronic filing.
- 7 807 KAR 5:001 Section 13(2)(b).
- 8 5. If and to the extent the Confidential Information becomes generally
- 9 available to the public, whether through filings required by other agencies or
- 10 otherwise, Big Rivers will notify the Commission and have its confidential status
- 11 removed. 807 KAR 5:001 Section 13(10)(b),
- 12 6. Pursuant to 807 KAR 5:001 Section 13(2)(a)(1) as discussed below,
- 13 the Confidential Information is entitled to confidential treatment and is being
- 14 submitted confidentially under the purview of KRS 61.878(1)(c)(1).
- 15 I. The Confidential Information is entitled to confidential treatment based upon KRS 61.878(1)(c)(1)
- 7. Under the Kentucky Open Records Act, the Commission is entitled
- 18 to withhold from public disclosure "records confidentially disclosed to an agency
- 19 or required by an agency to be disclosed to it, generally recognized as confidential
- 20 or proprietary, which if openly disclosed would permit an unfair commercial
- 21 advantage to competitors of the entity that disclosed the records." See KRS
- 22 61.878(1)(c)(1).

- 1 8. Subsection A below explains that Big Rivers operates in competitive
- 2 environments in the wholesale power market and in the credit markets.
- 3 Subsection B below shows that the Confidential Information is generally
- 4 recognized as confidential or proprietary. Subsection C below demonstrates that
- 5 public disclosure of the Confidential Information would permit an unfair
- 6 commercial advantage to Big Rivers' competitors. As such, the Commission
- 7 should grant confidential treatment to the Confidential Information.

A. Big Rivers Faces Actual Competition

- 9. As a generation and transmission cooperative, Big Rivers competes
- 10 in the wholesale power market. This includes not only the short-term bilateral
- 11 energy market, the day-ahead and real time energy and ancillary services
- 12 markets, and the capacity market to which Big Rivers has access by virtue of its
- 13 membership in Midcontinent Independent System Operator, Inc. ("MISO"), but
- 14 also forward bilateral long-term agreements and wholesale agreements with
- 15 utilities and industrial customers. Big Rivers' ability to successfully compete in
- 16 the market is dependent upon a combination of its ability to: 1) obtain the
- 17 maximum price for the power it sells, and 2) keep its cost of production or
- 18 purchase as low as possible. Fundamentally, if Big Rivers' cost of producing or
- 19 purchasing a unit of power increases, its ability to sell that unit in competition
- 20 with other utilities is adversely affected.

8

- 21 10. Big Rivers also competes for reasonably-priced credit in the credit
- 22 markets, and its ability to compete is directly impacted by its financial results.

- 1 Lower revenues and any events that adversely affect Big Rivers' margins will
- 2 adversely affect its financial results and potentially impact the price it pays for
- 3 credit. A competitor armed with Big Rivers' proprietary and confidential
- 4 information will be able to increase Big Rivers' costs or decrease Big Rivers'
- 5 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A
- 6 utility the size of Big Rivers that operates generation and transmission facilities
- 7 will always have periodic cash and borrowing requirements for both anticipated
- 8 and unanticipated needs. Big Rivers expects to be in the credit markets on a
- 9 regular basis in the future, and it is imperative that Big Rivers improve and
- 10 maintain its credit profile.
- 11. Accordingly, Big Rivers faces competition in the wholesale power and
- 12 capital markets, and the Confidential Information should be afforded confidential
- 13 treatment to prevent the imposition of an unfair competitive advantage to those
- 14 competitors.

15 B. The Confidential Information is Generally Recognized as Confidential or Proprietary

- 17 12. The Confidential Information for which Big Rivers seeks confidential
- 18 treatment under KRS 61.878 is generally recognized as confidential or
- 19 proprietary under Kentucky law.
- 20 13. As noted above, the Confidential Information protected under KRS
- 21 61.878(1)(c)(1) consists of or reveals information about confidential fuel supply
- 22 bids to Big Rivers and Big Rivers' analysis of those bids. The Confidential

- 1 Information is precisely the sort of information meant to be protected by KRS
- 2 61.878(1)(c)(1).
- 3 14. The Commission has often found that information similar to the
- 4 Confidential Information, relating to competitive bidding is generally recognized
- 5 as confidential and proprietary. See, e.g., In the Matter of Application of Union
- 6 Light, Heat and Power Company for Confidential Treatment, P.S.C. Case No.
- 7 2003-00054, Order (August 4, 2003). In fact, the Commission has granted
- 8 confidential treatment to the bid tabulation sheets that Big Rivers filed in
- 9 previous reviews of its fuel adjustment clause. See, e.g., letter from the
- 10 Commission dated September 22, 2010, in P.S.C. Case No. 2010-00269 and more
- 11 recently in P.S.C. Case No. 2019-00231.2 While not presented in separate bid
- 12 tabulation sheets, the Confidential Information contained in Big Rivers' amended
- 13 response to Item 5, represents the confidential bid tabulation and evaluation
- 14 related to solicitations.

¹ In P.S.C. Case No. 2003-00054, the Commission additionally implicitly accepted ULH&P's argument that the bidding contractors would not want their bid information publicly disclosed, and that disclosure would reduce the contractor pool available to ULH&P, which would drive up ULH&P's costs, hurting its ability to compete with other gas suppliers. *In the Matter of Application of the Union Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054, Order (Aug. 4, 2003). Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that without protection for confidential information provided to a public agency, "companies would be reluctant to apply for investment tax credits for fear the confidentiality of financial information would be compromised." *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

² In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2018 through April 30, 2019,P.S.C. Case No. 2019-00231, Order (April 2, 2020) (granting confidential treatment for fuel supply bids and Big Rivers' analysis of the bids, terms of future off-system sales and private usage information of individual retail customers).

- 1 15. In Hoy v. Kentucky Industrial Revitalization Authority, the Kentucky
- 2 Supreme Court held that financial information submitted by General Electric
- 3 Company with its application for investment tax credits was not subject to
- 4 disclosure simply because it had been filed with a state agency. 907 S.W.2d 766,
- 5 4 (Ky. 1995). The Court applied the plain meaning rule to KRS 61.878(1)(c)(1),
- 6 and reasoned: "[i]t does not take a degree in finance to recognize that such
- 7 information concerning the inner workings of a corporation is 'generally
- 8 recognized as confidential or proprietary." Id. at 768. Similarly, in Marina
- 9 Management Services, Inc. v. Commonwealth Cabinet for Tourism, the Court held:
- 10 "[t]hese are records of privately owned marina operators, disclosure of which
- 11 would unfairly advantage competing operators. The most obvious disadvantage
- 12 may be the ability to ascertain the economic status of the entities without the
- 13 hurdles systematically associated with acquisition of such information about
- 14 privately owned organizations." 906 S.W.2d 318, 319 (Ky. 1995).
- 15 16. In sum, the Confidential Information is not publicly available, is not
- 16 disseminated within Big Rivers except to those employees and professionals with
- 17 a legitimate business need to know and act upon the information, and is not
- 18 disseminated to others without a legitimate need to know and act upon the
- 19 information. As such, the Confidential Information details the "inner workings"
- 20 of Big Rivers' and is generally recognized as confidential and proprietary.

1 C. Disclosure of the Confidential Information Would Permit 2 an Unfair Commercial Advantage to Big Rivers' Competitors

- 3 17. Disclosure of the Confidential Information that is protected under
- 4 KRS 61.878(1)(c)(1) would permit an unfair commercial advantage to Big Rivers'
- 5 competitors. As discussed above, Big Rivers faces actual competition in the
- 6 wholesale power market and in the credit markets, and it is likely that Big Rivers
- 7 would suffer competitive injury if the Confidential Information were publicly
- 8 disclosed.
- 9 18. Given the nature of the Confidential Information, its disclosure
- 10 would provide other market participants, suppliers, and competitors insight into
- 11 the prices and terms at which Big Rivers is willing to buy fuel. In turn, the
- 12 Confidential Information could be used by potential fuel suppliers to manipulate
- 13 the bidding process, leading to higher costs to Big Rivers, thereby placing it at an
- 14 unfair competitive disadvantage in the wholesale power market and credit
- 15 markets.
- 16 19. Accordingly, public disclosure of the information that Big Rivers
- 17 seeks to protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers'
- 18 competitors with an unfair commercial advantage.

19 IV. Time Period

- 20. Big Rivers requests that all other Confidential Information remain
- 21 confidential for a period of five (5) years from the date of this motion, which will

- 1 allow sufficient time for the information to become sufficiently outdated to no
- 2 longer pose a competitive risk to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

3 V. Conclusion

- 4 21. Based on the foregoing, the Confidential Information is entitled to
- 5 confidential treatment, pursuant to 807 KAR 5:001 Section 13 and KRS 61.878. If
- 6 the Commission disagrees that Big Rivers' Confidential Information is entitled to
- 7 confidential treatment, due process requires the Commission to hold an
- 8 evidentiary hearing. See Utility Regulatory Comm'n v. Kentucky Water Serv. Co.,
- 9 Inc., 642 S.W.2d 591 (Ky. App. 1982).
- WHEREFORE, Big Rivers respectfully requests that the Commission
- 11 classify and protect as confidential the Confidential Information.
- On this the 19th day of May, 2022.

13	Respectfully submitted,
14	
15	/s/ Senthia Santana
16	
17	Senthia Santana
18	Tyson Kamuf
19	Whitney Kegley
20	Big Rivers Electric Corporation
21	201 Third Street
22	P.O. Box 24
23	Henderson, Kentucky 42419-0024
24	Phone: (270) 827-2561
25	Facsimile: (270) 844-6417
26	senthia.santana@bigrivers.com
27	tyson.kamuf@bigrivers.com
28	whitney.kegley@bigrivers.com
29	
30	Counsel for Big Rivers Electric
31	Corporation